United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

CA 75-7519

United States Court of Appeals

For the Second Circuit

THE FIRST NATIONAL BANK OF CINCINNATI,
Plaintiff,

against

SIDNEY PEPPER,
Appellant-Cross-Appellee,

ROSALIE M. ARLINGHAUS, Individually; ROSALIE M. ARLINGHAUS, as Custodian for Frank H. Arlinghaus, Jr.; ROSALIE M. ARLINGHAUS, as Custodian for John C. Arlinghaus; ANNA MARIE SCHLERETH; HARRY W. BOGAARDS, JR.; ELSIE W. COX; RICHARD M. HOUGH; RALPH J. DEL CORO; BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS,
Appellees,

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus,
Appellee-Cross-Appellant.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT AND CROSS-APPELLEE

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2

TABLE OF CONTENTS

Appellants' Reply Brief

Cross-Appellees Answering Brief

CITATIONS

Cases

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

THE FIRST NATIONAL BANK OF CINCINNATI, :

Plaintiff, :

-against- :

SIDNEY PEPPER, :

Appellant-Cross Appellee, : Docket No. CA #75-7519

ROSALIE M. ARLINGHAUS, Individually; :
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for Frank H. Arlinghaus, Jr.: ROSALIE :
M. ARLINGHAUS, as Custodian for John
C. Arlinghaus; ANNA MARIE SCHLERETH; :
HARRY W. BOGAARDS, JR.; ELSIE W. COX;
RICHARD M. HOUGH; RALPH J. DEL CORO; :
BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS,
:

Appellees,
:

ROSALIE M. ARLINGHAUS, as Executrix of
the Will of Frank H. Arlinghaus, :

Appellee-Cross Appellant. :

- -x

REPLY BRIEF ON BEHALF OF APPELLANT, SIDNEY PEPPER

When this case was before this Court on appeal from the Order granting summary judgment to Pepper, the Court set forth the items of proof which it would be incumbent upon the appellees to establish if they were to prevail, First National Bank of Cincinnati v. Pepper, 454 F.2d 626, 633 (1972).

In our principal brief we tracked this Court's formulation of the principles which were to govern the district court's decision upon the trial, and we showed that the district court erred in the following critical respects:

(1) In holding that Pepper had performed no compensable legal services which would sustain his retaining lien.

(2) In holding that the appellees' New York Supreme Court proceeding had been authorized by Eberle.

(3) In holding that June 7, 1968 was a "crisis" date for the appellees.

(4) In failing to find that that no avenues of immediate relief were available to appellees - the record is devoid of any showing that a further postponement was not available -- or that there was no alternative but to sign the agreement with Pepper or lose the deal with Unger.

Against this background, it would have been reasonable to expect that appellees would have come to grips in a meaningful way with our principal brief which challenged the district court's findings of fact and conclusions of law under the headings explicated in this Court's opinion, but one who reads the appellees' brief with such expectation is doomed to disappointment. We shall, therefore, under the separate heads of this Court's opinion, demonstrate that our principal brief's challenge to the correctness of the district

Court's decision has not been meaningfully assailed and that such challenge is entitled to prevail.

I.

Pepper's Right To Legal Fees

> "For the stockholders successfully to attack the settlement contract on the ground that it was obtained through unlawful duress of property, they must prove at trial that Pepper had no right to legal fees in connection with the Sonderling deal and that he refused to relinquish Modern's papers except on compliance with his unlawful demand for payment of such fees.[7]"

First National Bank of Cincinnati v. Pepper, supra, p. 633.

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7. Since the stockholders presumably required all of the materials withheld by Pepper in order to consummate their agreement with Unger, there would apparently be no duress if Pepper had a valid lien upon a portion of them. We express no opinion as to whether duress could be shown where an attorney, knowing that his claim for fees could be adequately secured by a portion of a client's property in his possession, asserts a retaining lien against the whole for purposes of extorting funds in excess of those due him. See, e.g., In re Birdseye, 165 App. Div. 898, N.Y.S. 617 (1st Dept. 1914) (no right to retain more of client's money than owed in fees); N.Y. Opinions No. 808 (Ass'n of the Bar of the City of N.Y. 1955) (implication of duty to relinquish client's papers when adequately secured by cash retained). See, generally, Aronoff v. Levine, 190 App. Div. 172, 179 N.Y.S. 247 (2d Dept. 1919), aff'd . mem., 232 N.Y. 529, 134 N.E. 558 (1921) settlement contract procured through assertion of excessive mechanic's lien "filed in bad faith and to extort money" rescinded) and Restatement of Contracts § 493, Comment on Clause (d)(1932), stating that duress of property may be shown when "the forms of law are used not simply for the purpose for which they are intended, but in an oppressive way for purposes of extortion."

We said in our principal brief that Pepper's work in screening some thirty prospective acquirers of Modern's business was a service to Modern outside the scope of Pepper's retainer, for which he was entitled to be compensated beyond the retainer amount (Br. pp. 4-8; 18-26). We made particular reference to but a few of the matters - Bell & Howell, Wometco Enterprises, McCandless - on which Pepper worked, for the purpose only of demonstrating that Pepper's efforts were taken at the direction and request of Lenz, Modern's president. This point was of significance only in connection with the retainer agreement (499a), for the Court below stressed its requirement that no charge for legal services not covered by the retainer would be made "except with Lenz' prior approval." We demonstrated (Br. p. 20) that the retainer could not be construed to subject Pepper's right to compensation to Lenz' prior agreement that compensation was in order or his agreement to the amount of such compensation; that if services

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7. (Footnote continued)

In general, duress of property or goods may be proved if the party holding them, even though due something, exacted excessive payment for their release; in such a case the excess may be recovered back. See, e.g., Baldwin v. Liverpool & Great Western Steamship Co., 74 N.Y. 125 (1878) (excessive payment for release of freight) and the seminal case of Astley v. Richards, 2 Strange 916, 93 Eng. Rep. 939 (K.B. 1732) (excessive payment to pawnbroker to redeem pledge); see also 13 S. Williston, Contracts § 1616 (1970).

outside the scope of the retainer were requested by Lenz or Modern's board of directors, the obligation to pay for them arose as a matter of law. Roberts v. Veterans Co-Op. Housing Asso., 88 A.2d 324 (Mun. Ct. of App.), D.C., (1952), Rudnick v. Tuckman, 1 A.D.2d 269, 149 N.Y.S.2d 809 (1956).

What do we find on the subject in appellees' brief?

We find, first of all, a concession that these screening services were requested of Pepper by Lenz (Appellees' Br. p.6), followed next by an effort to gloss over the subject - the very heart of the issue - by the statement that "[t]hese services obviously were the type of services routinely performed by the general counsel of a corporation". Obviously, general counsel of corporations perform such services and charge for them. The issue here is whether the imposition of a charge for these services was precluded by the retainer agreement. Quite clearly they were not. The retainer covered "legal services for the corporation of the character and amount heretofore performed. . ." When it is kept in mind that the retainer agreement is dated January 4, 1966, that the services referred to therein as to character and amount are services for 1965 and prior years - long before any thought was given to the sale of the business and long before, so far as appears from the record, any overtures were made to Modern by prospective acquirers - it is apparent that the retainer agreement did not comprehend the screening

services which Pepper performed. Thus, since Pepper was requested by Lenz to perform these services and did, in fact, perform them, he was entitled to be paid for them whether or not Mr. Lenz agreed or refused to agree on fair compensation for these special Pepper services. Roberts v. Veterans Co-Op. Housing Asso., supra.

It is noteworthy that no effort has been made by appellees to refute the foregoing argument. The best that appellees can do is to state, without reason or authority to support them, that "whatever legal services, if any, were involved in meeting management' requests for information about, or furnishing information to, potential buyers fell within his retainer; and if they had not, it would obviously have been too late for Pepper to obtain 'prior approval' after the rendition of the services and after his discharge" (Appellees' Br. p. 7). Something more than appellees' bold assertions is required to overcome the argument we have put forth.

Appellees find themselves in even greater difficulty when it comes to the Sonderling contract (553a-609a) in the face of the fact that appellees introduced it in evidence as part of Pepper's work product (Transcript, p. 312) and Pepper's uncontradicted testimony that he prepared it (Transcript, p. 317). After all, the contract was prepared pursuant to a board resolution authorizing the Sonderling transaction so

the Lenz "prior approval" argument cannot be invoked in this instance. What then do the appellees' say? In a footnote (Appellees' Br. p. 7) they say that there is no credible proof that the contract was Pepper's work (ignoring the fact that the contract was introduced in evidence by them and that Pepper's testimony on the subject was uncontradicted) as if only the attorney who prepares the first draft of an asset acquisition contract performs legal services and not the other attorney who reviews, edits, amends and discusses the draft with its author.

II.

The Appellees' Burden on the Issue of Duress - And How They Failed to Meet It

". . . In addition, they must prove that further resort to legal remedies would have been impracticable or futile in the circumstance[8] and that

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8. See, e.g., Peyser v. Mayor, 70 N.Y. 497, 501 (1877), stating that duress of property (goods) exists when its immediate possession "is so needful and desirable, as that an action or proceeding at law to recover [it] will not at all answer the pressing purpose." Accord, Adrico Realty Corp. v. City of New York, 250 N.Y. 29, 34, 164 N.E. 732 (1928). See also J.R. Construction Corp. v. Berkeley Apartments, Inc., 259 App. Div. 830, 19 N.Y.S.2d 500 (2d Dept. 1940); Gallagher Switchboard Corp. v. Heckler Elec. Co., 34 Misc. 2d 256, 263, 229 N.Y.S.2d 623, 630 (Sup. Ct. Kings County 1962); Underhill Construction Corp. v. Ciraldo, 24 Misc. 2d 29, 203 N.Y.S.2d 598, 600 (Sup. Ct. Nassau County 1960), aff'd mem., 12 A.D. 2d 945, 212 N.Y.S.2d 1006 (2d Dept. 1961).

as a practical matter there was no other means of immediate relief available to them (such as another postponement of the closing).[9] Otherwise the stockholders, represented by a competent and knowledgeable counsel, who negotiated a compromise agreement stating that Pepper had performed legal services and warranting that the stockholders signed "of their own free will," would not demonstrate the element of compulsion necessary to a finding of duress.

Thus the burden assumed by the stockholders is a heavy one. It may be that the district court's assumption that they are unable to sustain it will turn out to be correct. But we do not think that they may be precluded from attempting to do so merely by the fact that "their proceeding in the Supreme Court, New York County, remained undetermined." The stockholders have stated that on the date of closing (June 7, 1968) no time remained for further application to the state court, that no order had been issued by that court despite repeated communications in which the emergency nature of their predicament had been described, and that there was no alternative but to sign the agreement or lose the deal with Unger. If these representations were proved, as we must for present purposes assume that they could be, the outstanding state court action would not preclude their establishment of duress."

First National Bank of Cincinnati v. Pepper, supra, p. 633.

There is not a single word of testimony in the record that the Unger closing could not have been extended beyond June 7, 1968 if the Pepper settlement agreement had not been concluded on that date. The plain truth is that there was never a June 7 deadline - it was merely a date for a stockholders' meeting (Transcript, p. 379). Unger was present also.

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9. See Radich v. Hutchins, 95 U.S. [5 Otto] 210, 213 24 L.Ed. 409 (1877); accord, Lonergan v. Bufford, supra, 148 U.S. at 590, 13 S. Ct. 684 and Adrico Realty Corp. v. City of New York, supra, 250 N.Y. at 40, 164 N.E. 732; see also Gallagher Switchboard Corp. v. Heckler Elec. Co., supra.

There was no foreknowledge that Weil would telephone and that negotiations with Pepper would ensue. Weil did contact Pepper and his telephone message to such effect to Unger's office in Cincinnati was relayed to Unger at Modern's office in New York. Thus did the events of June 7 transpire, and it was only after the appellees had decided to settle with Pepper that Unger insisted that the deal be closed that day.

Mr. William Kelly, counsel for the appellees in this case, so testified (145a), saying:

> "He (Unger) made it clear that he was paying more for the financing for this particular project and had given two extensions and after the present stockholders were ready to pay, decided to pay $75,000 to Mr. Pepper, he finally took the position he wanted the deal closed as of that day and that was it." (Underscoring added.)

If the foregoing be doubted, consider what the appellees have to say on this vital point - nothing! Is it not incomprehensible that in the face of this Court's specification of the proof which appellees would be required to submit - that the relief of "another postponement of the closing" was not available to them - the record is devoid of any proof to that effect.

Where was Unger's testimony on this point? The appellees knew, because this Court had told them, that they had to prove the June 7 deadline. What better proof of that fact could there have been than the testimony of the man who is supposed to have fixed the deadline if, in fact, there was

one. Certainly Unger's testimony was available. Is not the appellees' failure to produce Unger's testimony on this vital issue to be counted heavily against them?

As a matter of fact, appellees cannot even establish that June 7, 1968 constituted a deadline. We grant that it may have been a date to which the tender offer had been extended, but we submit that the record is devoid of proof that it was a deadline that had to be met on pain of losing the Unger opportunity. We are fortified in this position by any number of considerations, some of which we list below:

A. As we demonstrated in our principal brief (pp. 43,44), at no time was it ever suggested to Justice Riccobono of the New York Supreme Court that there was a June 7 deadline confronting the appellees. Not one of the letters which counsel for the appellees delivered to Justice Roccobono as late as June 5 and June 6 (765 a, 769 a) and not one of the affidavits submitted by the appellees did other than to state that Unger's offer had been extended for a "limited, indefinite time" (737a, 739a-745a).

Is it conceivable that the appellees and their counsel would have failed to impress upon Justice Riccobono the fact of a June 7 deadline if, in reality, there was one pressing in upon them? In the absence of proof of a simple statement to Justice Riccobono that his decision would be useless after June 7, 1968, can it be said that appellees proved that "no order had been issued by [this] Court despite repeated

communications in which the emergency nature of their predicament had been described"? We think not.

B. Unger's tender offer (655a-656a) applied equally to the asset purchase transaction as to the stock purchase transaction. He was prepared to go forward with the asset purchase even though it could not have been concluded on June 7, 1968 (800a-823a). For ought that appears in the record, it was a matter of complete indifference to him whether he acquired the business via the stock or asset route. The investment was the same. In fact, it was agreed that both avenues would be pursued simultaneously (819a, 820a). There is nothing in the record to suggest that Unger would have been prepared to negotiate an asset transaction after June 7 but not a stock transaction. Is this the type of proof which satisfies this Court's requirements?

C. One who reads the transcript of the June 7, 1968 stockholders' meeting (801a-823a) will be struck by the absence of any Unger ultimatum, any reference to a deadline, or even any sense of urgency. Lenz summed up matters:

It was the practical part of wisdom to make the settlement. The proceeding might be protracted - Pepper, who had had a number of coronaries might die and litigation might drag on with his estate - Pepper might even win - the decision to litigate or settle should couple both principle and practicality - but not one word about any need to yield to Pepper

to meet any Unger deadline.

D. How do the appellees deal with this issue? In the single paragraph of their brief which they devote to this subject (Appellees' brief, p. 28, second paragraph), they can do no more than to refer to Exhibit JJJ (655a-656a), the Unger offer, which does contain a June 7, 1968 date in its text, but appellees' reference to Exhibit JJJ is nothing more than a red herring, for the June 7, 1968 date contained in Exhibit JJJ has not the slightest significance or bearing on whether or not the Unger offer expired on that date. What June 7 signified, in the context of Exhibit JJJ, is that it was the earliest date on which the Modern shareholders could possibly have hoped to receive payment if all of the conditions specified in Unger's offer had been satisfied on or prior to May 24, 1968.*

Unwilling to rely solely on their diversionary reference to Exhibit JJJ but having no affirmative proof of a June 7 deadline, appellees, in effect, concede that there was no June 7 deadline vis-a-vis Unger, but say that it was necessary to deal with Pepper at that time or face further delays in retrieving their stock certificates from him.

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* Satisfaction of the requirements specified in the Unger offer on or before May 24, 1968 was impossible since the Board of Directors did not rescind the Sonderling resolutions or waive the corporation's repurchase option so as to permit tenders to Unger until the board meeting of May 24, 1968.

What significance that statement has upon the issue is difficult to perceive for, assuming the truth of what appellees say, the fact that there would be a delay would be no consequence if Unger were willing to suffer the delay. The issue which this Court directed the appellees to address was not what Pepper would do but what Unger would do.

The appellees' assertion that Pepper made June 7 a crisis date for appellees is not alone irrelevant - it is a telling demonstration of the poverty of their position, for they are forced to resort to the flimsiest arguments in their effort to sustain their irrelevancy. Thus, they repeat the safari fiction (which we demolished in our principal brief, pp. 44, 45) and they say that it would have been impossible to serve Pepper with papers - as if all the papers were not already before Justice Riccobono, as if Pepper were not already represented by counsel upon whom any further papers could be served, and as if it had been established that Pepper, a reputable member of the Discipline Committee of the New York County Lawyers Association (Transcript, p. 18) - would have ignored any order which Justice Riccobono would have handed down.

The fact is that June 7, 1968 was not the end of the road for the appellees if they had not settled with Pepper. Since that is so, it is apparent that there was time remaining for the judicial process. There were other alternatives as

well - more effective legal procedures than those appellees employed - a bond to secure Unger against the missing certificates (see our principal brief, pp. 46, 47). The sum and substance of it all is that appellees knowingly pursued a course which would get them the stock certificates and, hopefully, their money back. The grievous errors of the district court which have permitted appellees to accomplish these objectives should not go unremedied.

III.

Appellees' Point I Considered or
A Futile Effort To Save the Day

Appellees' Point I hardly deserves the dignity of a response. Apart from what we feel is the questionable propriety of dragging in an entirely unrelated matter for the obvious purpose of prejudicing Pepper before this Court, where is the proof that Pepper divined when he requested the release - if, in fact, he, more than appellees requested that releases be exchanged (828a) - that Mrs. Arlinghaus would "two months later" institute another action against him.

What sophistry appellees exhibit! They say that if Pepper was entitled to precisely $75,000, he should not be permitted to retain anything of value that he received in excess of that amount. The simple answer was that Pepper's claim was for $116,000 and was compromised at $75,000 and that the releases were intrinsic to the settlement to put an

end to all claims of any character which either of the parties had against the other (except such as Mrs. Arlinghaus specifically reserved in her own favor).

All that is established by the cases which appellees cite in support of their position is that a release given under duress is voidable. Obviously so. The cases do not stand for the proposition that releases given in the context of a compromise of disputed claims are similarly voidable. Since Pepper had a claim for legal fees, which he compromised, the releases exchanged by the parties in the process are valid and binding.

Lastly, we inquire whether appellees contend that all the releases would be invalidated or only Mrs. Arlinghaus' release of Pepper. Would the releases given by Pepper remain effective while all others would be invalidated? Would Pepper's releases to appellees other than Mrs. Arlinghaus be invalidated also? Would they wish that to happen, and would it be in their interest to have it happen or would it be solely in the interest of Mrs. Arlinghaus and at the expense of the other appellees?

ANSWERING BRIEF OF SIDNEY PEPPER AS CROSS APPELLEE

In October 1970, more than two years after the start of the interpleader action that is the subject of the Pepper Appeal, Mrs. Rosalie M. Arlinghaus, as Executrix of the Will of Frank M. Arlinghaus (Arlinghaus), instituted a proceeding in the Monmouth County (New Jersey) Court, Probate Division (853a).

The proceeding was initiated by an order directing all interested persons to show cause why a judgment should not be entered, inter alia, (1) allowing Arlinghaus' First Intermediate Account, as Executrix, (2) approving the resignation of Clemens G. Arlinghaus as Trustee, (3) appointing the Chase Manhattan Bank (N.A.) as Successor Trustee, and (4) approving Arlinghaus' actions in making payments to Pepper for legal services (854a). In addition, the order purported to direct Pepper to submit an affidavit of services and to show cause why he should not be directed to repay to Arlinghaus the sums previously paid by her to him for legal services in 1966 and 1967, which aggregated $19,842.19 (855a et seq.).

Service on Pepper was made by mail and jurisdiction was asserted under the New Jersey long-arm statute, N.J. Civ. Prac. R. 4:4-4(e). Pepper did not appear personally, and on August 20, 1971, a judgment was entered in the Monmouth County (New Jersey) Court, Probate Division, approving the Arlinghaus

account in all respects (866a-867a), approving her payment of legal fees to Pepper (868a), approving the resignation of Clemens G. Arlinghaus as Trustee, and appointing the Chase Manhattan Bank (N.A.) as his Successor (867a-868a). In addition, judgment was entered against Pepper for $19,842.19, by reason of his failure to appear and file affidavits (870a).

Subsequently, in April 1972, Arlinghaus served an amended pleading herein which set forth a Fourth Cross-Claim against Pepper seeking full faith and credit treatment for the New Jersey judgment (17a)*. After trial, Judge Frankel made the following findings:

> "The cause of action in this claim does not arise out of acts done or transactions consummated in New Jersey. All of Pepper's work apparently devoted primarily to the federal estate tax, was done in New York. No soliciting was done in New Jersey, no contract entered into in that state. . . no acts committed there by Pepper that could be characterized as purposeful efforts indicating an intention to avail himself of the privilege of conducting business in that state, thus invoking the benefits and protection of its laws (456a-457a)."

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* The amended pleading also contained a Fifth Alternative Cross-Claim against Pepper alleging that some or all of the services for which the Estate paid Pepper were not performed by him, that some or all of the services for which the Estate paid Pepper were not performed on behalf of the Estate but for others, that Pepper forfeited the right to compensation for any services by acting in bad faith and disloyally in the transactions for which fees for his services were paid, and that Pepper never obtained approval for the payment of the fees from the New Jersey Probate Court (18a-19a). After trial, finding a "substantially total failure of proof", Judge Frankel dismissed the Fifth Alternative Cross-Claim (457a-458a). Arlinghaus has not appealed that determination.

Based on the foregoing, Judge Frankel found that the assertion of jurisdiction by the New Jersey Court was ineffectual and, therefore, that its judgment was not entitled to full faith and credit (456a). Arlinghaus does not dispute the factual findings (Appellee-Cross Appellant's Brief, p. 45). She adds only that Pepper mailed periodic statements to her in New Jersey for legal fees and disbursements, which statements were paid. The record does not indicate, and Arlinghaus does not assert, that payment was made from New Jersey for the estate account may have been kept in New York.

ARGUMENT

The Judgment of the New Jersey County Court Is Not Entitled to Full Faith and Credit

Any state judgment purporting to bind the person of a defendant over whom the court had not acquired in personam jurisdiction is void within such state as well as without. Pennoyer v. Neff, 95 U.S. 714 (1877). Because such a state judgment is offensive to the Due Process clause of the Fourteenth Amendment, it is not entitled to full faith and credit, 28 U.S.C.A. § 1738, Riley v. New York Trust Co., 315 U.S. 343 (1942).

Mr. Chief Justice Warren, writing the opinion of the Supreme Court of the United States in Hanson v. Denckla, 357 U.S. 235, 251, 253 (1958), stated that:

> [T]he requirements for personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he had had 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. Washington, 326 U.S. 310, 319.
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> * * *
>
> The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington, 326 U.S. 310, 319.

Forum Contacts

Judge Frankel made the following findings: (1) that this claim does not arise out of acts done or transactions consummated in New Jersey, (2) that all of Pepper's work was done in New York, (3) that no soliciting was done in New Jersey, (4) that no contract was entered into in that State and (5) that Pepper had committed no act "indicating an intention to avail himself of the privilege of conducting business in [New Jersey], thus invoking the benefits and protection of its laws" (456a-457a). Arlinghaus does not challenge any

of the findings.

It is also undisputed that apart from his performance of services for Arlinghaus, Pepper had no other contacts whatsoever with New Jersey.

The issue on appeal is thus whether a non-resident attorney who at the request of a forum resident, renders services outside the forum to such resident, in the course of which he mails bills for his services into the forum and receives payment therefor, but who otherwise has absolutely no contacts with the forum, thereby "purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Pepper's mailing of periodic statements for legal fees and disbursements into New Jersey is clearly an insignificant contact. See Agrashell, Inc. v. Bernard Sirotta Company, 344 F.2d 583, 587 (2d Cir. 1965); Benjamin v. Western Boat Building Corporation, 472 F.2d 723, 729-730 (5th Cir. 1973); Kulm v. Idaho First National Bank, 428 F.2d 616, 618-619 (8th Cir. 1970); Arkansas Poultry Cooperative, Inc., 468 F.2d 538, 539-540 (8th Cir. 1972); Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368, 370 (M.D.N.C. 1967) aff'd., 391 F.2d 266 (4th Cir. 1968); Bennett v. Computers Intercontinental, Inc., 372 F. Supp. 1082 (D.Md., 1974); Webb v. Stanker and Galetto, Inc., 84 N.J. Super. 178, 185 (App. Div. 1964), cert. den'd., 43 N.J. 263 (1964), cert.

den'd, 380 U.S. 907 (1965); Bernardi Bros. v. Pride Mfg., Inc., 427 F.2d 297, 302 n.9 (3rd Cir. 1970).

Pepper's receipt of payment, coupled with the submission of bills, did not constitute purposeful activity invoking the benefits and protections of New Jersey law. See Webb v. Stanker and Galetto, Inc., supra at 728; Arthur, Ross & Peters v. Housing, Inc., 508 F.2d 562, 565 (5th Cir. 1975); DeLear v. Rozel Packing Corp., 95 N.J., Super. Ct. 344, 350 (App. Div. 1967), Hanson v. Denckla, supra at 252 n. 24.

Arlinghaus points to no other contacts between Pepper and New Jersey. He is a New York attorney who performed services for Arlinghaus having no direct reference to the State of New Jersey. It is common knowledge that the practice of the professions of law and medicine are essentially local, with practitioners being licensed by the State. One licensed to practice in New York is generally not authorized to practice in New Jersey and vice versa. Arlinghaus does not assert that Pepper violated the out-of-state practice rules, or that she was unaware of their implications as to the locality of his practice. Having voluntarily come to New York to obtain the benefit of Pepper's services, with the knowledge that he was licensed to practice in New York only, Arlinghaus can hardly claim that justice later required Pepper to go to New Jersey to litigate with her. See Markham v. Gray, 393 F. Supp. 163, 167 (W.D.N.Y. 1975).

It is respectfully submitted that Judge Frankel correctly applied the principles established in Hanson v. Denckla, supra, in determining that Pepper did not purposefully avail himself of the privilege of conducting activities in New Jersey such as to subject himself to personal jurisdiction in that forum.

Forum Effects

To compensate for the lack of a nexus between Pepper's acts and the State of New Jersey, Arlinghaus alleges that Pepper's acts had effects in New Jersey which establish a basis for jurisdiction. But no effects are specified. Arlinghaus' First Intermediate Account was approved in all respects (866a-867a) and her actions in making payments to Pepper for legal services were approved (868a).

Under the circumstances, however, given Pepper's insignificant contacts with New Jersey, even if his New York acts had New Jersey effects,* they could not support New Jersey

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* A distinction must be drawn between the assertion that an act had effects (e.g., caused injury) in New Jersey, and the jurisdictionally meaningless assertion that an act caused injury to Arlinghaus who is a resident of New Jersey. Friedr. Zoellner (N.Y.) Corp. v. Tex Metals Co., 396 F.2d, 200, 303 (2nd Cir. 1968); American Eutec. Weld. Alloys S.Co. v. Dytron Alloys Corp., 439 F.2d 428, 433 (2nd Cir. 1971).

in personam jurisdiction over him. See Agrashell, Inc. v. Bernard Sirotta Company, supra.

In consensual relationships between persons resident in different states, the acts of one will generally have effects on the other. But such relationships do not always present the minimal contacts necessary for each forum to establish personal jurisdiction over both parties. Forum effects, therefore, though logically necessary, are not a sufficient basis for jurisdiction. When they arise out of a contract made, and to be performed, outside the forum, and when they are unaccompanied by other meaningful contacts between the non-resident and the forum, forum effects do not give rise to jurisdiction. See Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., supra; Benjamin v. Western Boat Building Corp., supra at 729-730; Arthur, Ross & Peters v. Housing, Inc., supra; DeLear v. Rozell Packing Corp., supra.

The cases cited by Arlinghaus are not in conflict with this position, and thus afford her no support. Each of McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); W.A. Kraft Corp. v. Terrace on the Park, Inc., 337 F. Supp. 206 (D.N.J. 1972) and Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970) involves a non-resident who actively initiated a contract relationship with a forum resident by solicitation in the forum. They do not support an assertion of jurisdiction based on forum effects absent forum solicitation. The stream of commerce tort cases

cited by Arlinghaus, involving injuries caused by goods placed in interstate commerce, are inapplicable to consensual relationship situations.

Forum Interest

Forum interest and convenience are, at most, subsidiary factors in determining the constitutionality of an exercise of personal jurisdiction. Aftanase v. Economy Baler Company, 343 F.2d 187, 197 (8th Cir. 1965); Kulm v. Idaho First National Bank, supra at 619. They are not a substitute for minimum contacts. Hanson v. Denckla, supra at 254; Agrashell, Inc. v. Bernard Sirotta Company, supra at 587.

The facts of Hanson are instructive as to the interplay of forum interest and minimum contacts, for Hanson involved a dispute arising out of the administration of a will probated in Florida. For eight years prior to the death of a trust settlor, a Delaware trust company, as trustee of a trust created by the settlor, had maintained business relations with the settlor who resided in the State of Florida, regularly communicating with her with respect to the business of the trust. Upon the settlor's death, a dispute arose as to whether certain property should pass under the trust or under the settlor's will. Florida's interest in the matter was great for the settlor and most of the appointees and beneficiaries under the trust were domiciled in Florida. Distribution of the

assets of the estate could not be made without determining the validity of a power of appointment executed in Florida and of the underlying trust agreement. In a Florida probate proceeding initiated to determine the matter, personal jurisdiction was asserted on the Delaware trustee pursuant to Florida's long-arm statute. Service was by mail.

The Supreme Court of the United States held that the Delaware trustee had not, by its lengthy business relationship and correspondence with the settlor, availed itself of the privilege of conducting business in Florida, and therefore that Florida's exercise of personal jurisdiction over it in the probate proceeding was inconsistent with due process. The Court stated: (357 U.S. 235, 254)

> [A] state does not acquire [personal] jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee. As we have indicated, they are insufficient to sustain the jurisdiction.

Notably, though the dissenting justices thought Florida's interest relevant, the Supreme Court did not acknowledge Florida's interest in the probate proceeding as a factor to be considered in determining the constitutionality of its assertion of jurisdiction. Only the acts of the non-resident were relevant.

Arlinghaus' reliance on McGee v. International Life Insurance Company, supra, is misplaced. First, the principal

fact in McGee was the purposeful act of the foreign insurer in soliciting a reinsurance agreement with a California resident. It is that act that separates McGee from Hanson. Judge Frankel found neither solicitation nor any other acts by Pepper in New Jersey.

Second, California's regulatory legislation, the Unauthorized Insurer's Process Act, was directed precisely at foreign insurers soliciting in that state. The focus of New Jersey's regulatory interest in estate administration is the resident executrix, not non-resident Pepper.

Third, in McGee the Court emphasized that because many life insurance claims are small, individual claimants frequently could not afford the cost of bringing an action in a foreign forum, in effect making the company judgment-proof. McGee, supra, at 223. The same is not true in the estates field, particularly amongst those who, because of their multi-state business holdings, seek the services of out-of-state attorneys.

Convenience. We agree with Arlinghaus (Cross-Appellant's Brief, p. 46) that convenience of the parties mandated New York jurisdiction. This factor, though, like forum interest, is of little weight. Hanson v. Denckla, supra, at 254.

Whatever hypothetical economy might have been achieved by litigating all estate matters in one proceeding is irrelevant to the instant case. In fact, for two years prior

to the initiation of the New Jersey proceeding, Arlinghaus in her representative capacity as Executrix, chose to assert estate claims against Pepper in two separate actions* in the United States District Court for the Southern District of New York. Arlinghaus does not, and truthfully could not, assert that a litigation against Pepper in New York would have been inconvenient for her.

The New Jersey intermediate account proceeding was required to relieve and discharge Clemens G. Arlinghaus, who had resigned as one of the trustees under the Will of Frank H. Arlinghaus, and to secure the appointment of the Chase Manhattan Bank (N.A.) as successor trustee in his place (854a). Since the Southern District actions were already pending, and the New Jersey accounting was required by her co-trustee's resignation, Arlinghaus had the choice of adding her claim against Pepper to either of the two actions, without significant additional expense.

It may be surmised that the New Jersey forum was selected because of its inconvenience to Pepper.

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* The instant case and Arlinghaus v. Ritenour, 68 Civ. 3537.

CONCLUSION

The decision of the district court awarding the interpleader fund to the appellees should be reversed and this Court should direct that the full amount of the fund be paid to Sidney Pepper.

The decision of the district court dismissing the cross-appellant's fourth cross-claim should be affirmed.

Respectfully submitted,

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Service of ~~three~~ two (3) copies of the within
is admitted this 6th day of February 1976

Craig Hoard Mitchell
Esq